

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2103

To be argued by
RICHARD WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2103

LOUIS OSTRER,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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**United States Court of Appeals
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Docket No. 77-2103

LOUIS OSTRER,
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—V.—

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Ostrer appeals from an order entered on August 12, 1977, in the United States District Court for the Southern District of New York, by the Honorable Charles L. Brieant, United States District Judge, denying, after a hearing, petitioner's motion pursuant to Title 28, United States Code, Section 2255, to vacate his conviction and to grant a new trial.

Indictment 71 Cr. 558 was filed on May 27, 1971. Count One charged nine defendants, including Ostrer, with conspiring to violate provisions of the federal securities laws and the mail and wire fraud statutes in connection with the manipulation of the stock of Belmont Franchising Corporation. Counts 2 through 40 charged Ostrer and others with various substantive violations of the securities and mail fraud statutes.

A jury trial of Ostrer and co-defendant John Dioguardi began before Chief Judge David N. Edelstein on January 4, 1973, and concluded on January 26, 1973, when the jury found Ostrer guilty on Counts 1, 9, 16, 17, 18, 19, 31, 33, 34, 35 and 36, and not guilty on six other counts.* On March 1, 1973 Ostrer moved for a new trial on the basis of a juror's alleged mental incompetence. On April 12, 1973, Chief Judge Edelstein denied the motion and sentenced Ostrer to three years imprisonment and \$55,000 in fines. The convictions of Ostrer and Dioguardi were affirmed by this Court. *United States v. Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974).

On April 14, 1977 Ostrer filed the present petition ** pursuant to Title 28, United States Code Section 2255, seeking a new trial on the grounds that certain statements in the book *Wall Street Swindler*, by Michael Hellerman, showed that the Government had violated its obligations

* The District Court had acquitted Ostrer of the remaining twenty-three counts upon motion. Dioguardi was found guilty on Counts 1, 16, 17, and 31, and a mistrial was declared as to him on fifteen other counts as to which the jury could not reach a verdict.

Of the seven other defendants named in the indictment, three entered guilty pleas and three were convicted after a separate trial. See *United States v. Greenberg*, Dkt. No.72-2368 (2d Cir.), aff'd from the bench, February 16, 1973. The indictment was not tried as to Morris Winter, a cooperating defendant, who pleaded guilty in another case.

** On December 11, 1974 Ostrer filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure claiming that during his trial the federal government was privy to conversations between Ostrer and his attorneys in violation of Ostrer's Fourth and Sixth Amendment rights. Judge Briant conducted hearings on March 1, 3 and 4, 1976, and on June 4, 1976 denied the motion. *United States v. Ostrer*, 422 F. Supp. 93 (S.D.N.Y. 1976). The order denying a new trial was affirmed by this Court. *United States v. Ostrer*, 551 F.2d 303 (2d Cir.), cert. denied, 430 U.S. 946 (1977).

under *Brady v. Maryland*, 373 U.S. 83 (1963), and Title 18, United States Code, Section 3500.* Ostrer also claimed that he had additional evidence of the mental instability of a juror who sat at his trial. On May 10, 11 and 31, 1977, Judge Brieant conducted an evidentiary hearing. On August 12, 1977, the District Court in a forty-two page opinion denied Ostrer's motion to vacate his sentence and to grant a new trial. (A. 310-61).**

Ostrer remains free on bail pending this appeal, as he has since the date of his conviction on April 12, 1973.

Statement of Facts

A. Ostrer's Conviction

Ostrer was convicted of conspiring to manipulate the price of an essentially worthless security—Belmont Franchising Corporation. The facts as developed at the trial are summarized in this Court's opinion in *United States v. Dioguardi*, *supra*, 492 F.2d at 73-75, to which we respectfully refer the Court, as well as in the statement of facts in the Government's brief filed in connection with the appeal. *United States v. Dioguardi and Ostrer*, Dkt. Nos. 73-1759, 73-1769.

Briefly stated, the evidence showed a price manipulation scheme designed to raise artificially the price of Belmont stock from a few dollars a share to nearly \$50 a share. Initially co-conspirator Hellerman, Anthony Soldano, and Fred Goodman began to acquire all

* Michael Hellerman testified as a Government witness implicating Ostrer in the Belmont Franchising stock manipulation. *The Wall Street Swindler* is an autobiographical account of his many faceted criminal life.

** The designation "A." refers to appellant-petitioner's appendix; "AX." refers to the appendix of exhibits filed by appellant-petitioner.

the publicly held shares of Belmont, and to create artificially the appearance of an active market in the stock. Certain agreements were negotiated between Hellerman and his benefactor Dioguardi on one side, and Soldano and Goodman on the other side. After the manipulation began, Ostrer joined the scheme agreeing to buy 14,000 shares at \$15 a share—one-half of all the publicly held stock. Ostrer was to split future profits with Hellerman, and Ostrer was guaranteed against loss.

In order to purchase the 14,000 shares, Ostrer had to use brokers who had joined Hellerman's and Dioguardi's manipulation scheme. When Ostrer was unable to raise the entire \$210,000, he obtained a loan through Dioguardi. The loan of \$60,000 ultimately came from Hickey DiLorenzo, and Ostrer agreed to pay 1½% interest a week. When Hellerman also loaned Ostrer \$52,500, Ostrer was able to purchase the 14,000 shares.

As the scheme developed, Hellerman directed purchases and sales of Belmont stock to people he controlled. At one point he arranged for Ostrer to sell stock through a nominee so that Ostrer could repay the \$60,000 DiLorenzo loan. Ostrer made a \$1700 profit after repaying DiLorenzo and split this with Hellerman.

The scheme eventually collapsed, and Ostrer suffered a substantial loss. Ostrer wanted Hellerman to make good on his guarantee against losses, and DiLorenzo took Ostrer's side. Dioguardi arbitrated the dispute, and arranged for Ostrer to receive compensation of \$25,000.

B. The Claimed *Brady* Violations Alleged in the Present Petition.*

1. The Government's Release of \$80,000 Belonging to Natco, Inc. And Merchandise Plus, Inc.

During early 1971, Hellerman, Steven Schusteck, and several other individuals participated in a bankruptcy fraud designed to drain the assets of Natco, Inc. and Merchandise Plus, Inc. (referred to as "Natco"). The basic purpose of the scheme was to drive the company into bankruptcy and steal the companies' assets. While Hellerman was participating in the fraud, he began secretly to cooperate with the Government and informed Assistant United States Attorney Robert Morvillo of the scheme.**

As the fraud evolved and the co-conspirators drained the companies' assets, eventually \$80,000 of corporate funds still existed. Various schemes to procure and convert the \$80,000 into useable cash—money washing—were devised, but before the last \$80,000 could be diverted the FBI was able to interfere with the scheme, and obtained custody and control over the \$80,000 of Natco funds. (A. 1350-54, 1384-85, 1582-83). Hellerman and his co-conspirators were indicted for their involvement in the scheme.

* At the hearing on his present motion pursuant to section 2255, Ostrer alleged numerous *Brady* violations, many of which he has abandoned on this appeal. Accordingly we enumerate below the facts as developed at the hearing which relate only to the claimed *Brady* violations still pursued by Ostrer in this Court.

** At all times referred to during these events, Mr. Morvillo was either chief of the frauds unit or the chief of the Criminal Division in the United States Attorney's Office for the Southern District of New York.

Several Assistant United States Attorneys, including Mr. Morvillo, were concerned that the Government had no legal right to keep the money. The United States Attorney's office believed that Natco was an ongoing company, and that the Government could be accused of aiding the company's bankruptcy by holding onto the money. (A. 1588-89). In short, the United States Attorney's office believed the Government had no lawful right to keep the money, and that the Government might be liable to Natco's legitimate creditors if "we deliberately took that money and refused to release it." (A. 1589).

Consequently the Government released the \$80,000 to an attorney, Edward Kurland, Esq., who claimed to represent the corporation. (AX. 14). At the time Mr. Kurland was given the \$80,000, he was told by Mr. Morvillo that the money was to be placed into a corporate account. (A. 1653, 1657, 1666). Kurland also gave the Government a letter stating that he represented Natco, that he was demanding the return of the \$80,000 on behalf of the company, and that he would be responsible for the disposition of the funds. (AX. 14).

At approximately the same time that the Government gained control over the \$80,000 of Natco funds, Hellerman owed approximately \$80,000 to loan sharks who had given him financial backing. Hellerman, who was now secretly cooperating with the Government, asked Assistant United States Attorney Morvillo for help in paying off the loan sharks. (A. 1368).

Mr. Morvillo recollected that Hellerman had suggested that he might be able to use Natco's \$80,000 to repay the loan sharks, and once he gave the money to the loan sharks, they could be arrested. This suggestion was rejected by the Government. (A. 1576-77). Indeed, Morvillo emphatically informed Hellerman that under no circumstances would the \$80,000 in Natco funds be released to him. (A. 1640). Realizing that the Gov-

ernment had to release the money to an attorney or other representative of the company, Morvillo made it absolutely clear to Hellerman that he would be liable for prosecution if Hellerman subsequently purloined, stole, or embezzled the \$80,000 of Natco funds. (A. 1366, 1374, 1381, 1641).

After Kurland received the \$80,000 from the Government, he deposited the check into a corporate bank account. (A. 1655). The money was withdrawn from the account and, unbeknown to the Government at the time, used by Hellerman and his co-conspirator Schusteck to repay the loan sharks. (A. 1384). Morvillo could not recall knowing prior to the Ostrer-Dioguardi trial that Hellerman used the \$80,000 to pay back Natco "loans" borrowed from loan sharks. (A. 1584, 1608-09); Hellerman did not recall apprising Morvillo of the ultimate disposition of the \$80,000. (A. 1390).

2. The Switzerland Trip

By the summer of 1972 Hellerman had been named as a defendant in several indictments. Accordingly, he was subject to the jurisdiction of the District Court which had the sole power to impose geographic limitations on his travel. At the same time he was covertly cooperating with the Government, and it was only a matter of time until his status as a cooperating defendant would become known and Hellerman would have to be re-located. (A. 1437).

In July or August of 1972, Hellerman wanted to travel to Europe. Since he was subject to the jurisdiction of the District Court, Hellerman, by his attorney, Vincent Broderick, appeared before Judge Lasker and asked the Court to extend Hellerman's bail limitations. Judge Lasker granted Hellerman's motion, with the understanding that he would leave an itinerary of his trip. (A. 1437). The Government neither opposed nor

consented to this motion. Prior to Hellerman making his bail motion before Judge Lasker, Morvillo received assurances from Hellerman's attorneys, Messrs. Broderick and Edwards, that Hellerman was not using the trip as a vehicle to either secrete money in a foreign bank or flee. (A. 1630).

There is no evidence in this record to suggest that any Government representative knew that Hellerman had traveled to Europe with substantial sums of money or that he had deposited any money in a foreign bank account. Indeed, the only evidence Ostrer was able to elicit on this point was that of Martin Roth—who has been convicted of obstruction of justice and stock fraud in two separate cases, and who believes he has Hellerman to thank for his legal problems. (A. 1724). Roth claimed that Hellerman had told him that he had placed approximately \$300,000 in a foreign bank account. (A. 1722). Roth acknowledged that Hellerman never told him that he had informed the United States Attorney's office that he was depositing money in a Swiss bank account. (A. 1730).

3. Reduction of Hellerman's Attorney's Fees

By early 1971 Hellerman had been named as a defendant in several criminal indictments. Hellerman obviously needed an attorney, but since at that time he was secretly cooperating with the Government he needed an attorney without organized crime connections. (A. 1423). Martin Roth—one of Hellerman's criminal confederates—suggested that Hellerman use the Nizer law firm. This idea appealed to Hellerman because he knew that former Police Commissioner and Assistant United States Attorney Vincent Broderick was a member of that firm, and he could be trusted to represent a defendant who was secretly cooperating. (A. 1423, 1425-26).

Early in 1971 Hellerman arranged a meeting with Louis Nizer and Vincent Broderick. Unfortunately Mar-

tin Roth had a relative at the firm, and Roth attended the first meeting among Hellerman, Broderick and Nizer. Since Roth was present, Hellerman had to make it appear as if he intended to stand trial rather than inform Nizer and Broderick of his intention to cooperate. (A. 1423-25). Consequently, Mr. Nizer told Hellerman that the firm's legal fee would be \$100,000.

Following this meeting with Messrs. Broderick and Nizer, Hellerman spoke with Morvillo. He asked Morvillo to telephone Mr. Broderick to inform him about Hellerman's status as a cooperating defendant and about the legal fee. Morvillo agreed to speak to Mr. Broderick about Hellerman's status as a potential witness, but refused to discuss the legal fee with Mr. Broderick. (A. 1616). Morvillo, subsequently spoke with Mr. Broderick and discussed the fact that Hellerman was a cooperating defendant. However, at no time did Morvillo discuss with Mr. Broderick the matter of Hellerman's legal fee. (A. 1617-19, 1643).

After Mr. Broderick was informed that Hellerman had already entered into a plea agreement with the Government and that Hellerman's representation would therefore not involve lengthy trials, the legal fee was reduced. (A. 1429-32). At that juncture, in early 1971, Hellerman's understanding with the Government was that Hellerman would provide the Government with information and he would plead guilty to one count in the Imperial case; Hellerman would not have to testify. (A. 1429-30). At some point in 1972 Hellerman breached the agreement by committing additional crimes while cooperating. In October 1972 Hellerman reached a new agreement whereby he would plead guilty to his involvement in three stock manipulations, and would be required to testify before grand juries and at public trials. (AX. 272).

C. The District Court Opinion

The District Court's opinion addressed each of Ostrer's claimed *Brady* and Section 3500 violations. Judge Brieant concluded that the Government should have disclosed the Government's role in releasing the \$80,000 and Hellerman's securing of those funds and inferred from a number of factors that the failure to disclose was intentional. (A. 314-22). Judge Brieant further found a *Brady* violation in the Government's failure to have informed defense counsel that it had not opposed Hellerman's request before Judge Lasker to travel to Europe in the summer of 1972. The District Court characterized this *Brady* violation as unintentional. (A. 326).

The District Court rejected each of Ostrer's other contentions. Specifically Judge Brieant ruled that the Government did not violate its *Brady* obligations in the following areas: 1) Hellerman's motion to reduce his sentence (A. 326-27); 2) Hellerman's place of imprisonment (A. 327); 3) Reduction of Hellerman's legal fees (A. 328-29); 4) Non-prosecution of Hellerman's family (A. 329-30). The District Court also found that the Government did not violate the mandate of 18 U.S.C. § 3500 (A. 330-33), and that Hellerman had not committed perjury at Ostrer's trial. (A. 333-41).

Finally, Judge Brieant concluded that the Government's failure to have furnished counsel with the information about the \$80,000 and its non-opposition to Hellerman's trip to Europe, did not entitle Ostrer to a new trial. After reviewing the entire record of the Ostrer trial, the District Court, in denying Ostrer's motion, sensibly concluded:

"In view of the extensive data provided to the jury, we find that the Natco information is not material, in the sense that it probably would not

have affected the outcome of the trial. In words quoted from *Agurs*, p. 102, it 'shed no light on Sewell's [read Hellerman's] character that was not already apparent from the uncontradicted evidence.' Nor does the suppressed evidence raise a reasonable doubt. One more promise or benefit to Hellerman is no evidence of Ostrer's innocence. Therefore, the Court concludes that the suppression of the Natco \$80,000.00 matter does not require us to grant Ostrer a new trial.

The Swiss trip does not warrant a new trial since, for the same reasons set forth above, there is no probability that this information would have raised a reasonable doubt. The jury was well acquainted with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance. Ostrer is therefore not entitled to a new trial based on the suppression of information concerning the Swiss trip." (A. 349-50).

ARGUMENT

POINT I

The District Court Correctly Decided That Ostrer Was Not Entitled To a New Trial Because The Additional Impeachment Material Could Not Have Influenced the Jury's Verdict.

Ostrer contends that Government suppression of evidence useful to the defense in cross-examining Hellerman requires the ordering of a new trial under *Giglio v. United States*, 405 U.S. 150 (1972). He argues that the decision in *Giglio* remains undisturbed by the subsequent opinion in *United States v. Agurs*, 427 U.S. 97 (1976).

Alternatively he contends that a new trial is required because the Government failed to respond fully to a specific defense request for exculpatory material.

We will demonstrate in this point that even assuming the information not disclosed was subject to production under *Brady v. Maryland*, Ostrer's arguments are not persuasive, and that the District Court's application of *United States v. Agurs* to the facts as found by Judge Brieant was entirely correct.* In view of the substantial impeachment of Hellerman at Ostrer's trial, it is inconceivable, as the District Court found, that the additional impeachment material could have had any meaningful impact on the jury which convicted Ostrer. Accordingly, the District Court's denial of Ostrer's petition was entirely proper.

In *United States v. Agurs*, 427 U.S. 97 (1976) the Supreme Court held that the rule of *Brady v. Maryland*, 373 U.S. 83 (1973) applied with different results in three distinct situations: 1) where the undisclosed evidence shows that the Government's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury; 2) where the defendant made a specific request for the particular undisclosed information; and 3) where the defendant makes no *Brady* request or makes only a general request for "Brady material." ** The Court held that when the Government suppression fell within either of the first two categories, a defendant is entitled to a new trial if the suppressed evidence is material—i.e., whether the evidence might have affected the outcome of the trial. If the suppressed evidence falls within the third category, the defendant is

* We address in Point II, *infra*, our argument that Judge Brieant incorrectly decided that the non-disclosures in this case amounted to *Brady* violations.

** In the brief we will refer to these three distinct *Brady* situations as category one, category two, and category three respectively.

entitled to a new trial only if the omitted evidence creates a reasonable doubt which otherwise did not exist. The record in this case makes clear that the information Judge Brieant found was *Brady* material falls within the third category and thus Ostrer is entitled to a new trial only if the omitted evidence creates a reasonable doubt that otherwise did not exist.

A. The Facts Of This Case Do Not Fall Within The First Category of *Brady* Cases—Government's Knowing And Undisclosed Use of Perjured Testimony.

Disregarding the plain meaning of *United States v. Agurs*, Ostrer vainly attempts to argue that the facts developed at the evidentiary hearing place this case within the first category of *Brady* type cases as explained in *Agurs*. He must make this strained argument because unless the facts fall within the first category—the Government's knowing use of perjured testimony—his claim for a new trial must fail since the pre-trial discovery requests made by Ostrer and Dioguardi cannot be properly construed as requests for specific *Brady* material as contemplated by *United States v. Agurs*. Consequently, Ostrer's case would inevitably fall within the third category outlined in *United States v. Agurs*, and Ostrer would have to prove that the allegedly undisclosed evidence would have created a reasonable doubt as to his guilt—an impossible burden in light of the facts of this case.

This case certainly does not fall within the first category of *Brady* cases. The record is simply devoid of any facts to justify a finding that a Government witness lied at Ostrer's trial, and the Assistant United States Attorney stood mute and permitted the perjured testimony to stand uncorrected. Judge Brieant found and we do not understand Ostrer seriously to contend otherwise that this is

not a case where the government knew one of its witnesses was committing perjury.*

Ostrer argues that this case is controlled by *Giglio v. United States*, 405 U.S. 150 (1972). Ostrer's claim must be evaluated under the rules established in *United States v. Agurs*, the Supreme Court's most recent discussion of the Government's *Brady* obligations. See *United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976); *Brach v. United States*, 542 F.2d 4, 6 (2d Cir. 1976); *United States v. Erb*, 543 F.2d 438, 443 (2d Cir. cert. denied, 429 U.S. 981 (1976)); *United States v. Corr*, 434 F. Supp. 408, 414 (S.D.N.Y. 1977). *Giglio v. United States* falls within the first category of *Brady* cases as explained in *United States v. Agurs*; *Giglio* is explicitly cited in *Agurs* as a case where the Government knowingly used perjured testimony. *United States v. Agurs*, *supra*, 427 U.S. at 103, n. 8, 9. See also *Annunziato v. Manson*, Dkt. No. 77-2017, slip op. 463, 469-72 (2d Cir. Nov. 21, 1977).

On appeal Ostrer does not appear to press seriously the argument that Hellerman's testimony was perjur-

* See *Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935); *United States v. Stofsky*, 527 F.2d 237, 243-45 (2d Cir. 1975), cert. denied, 425 U.S. 92 (1976). It thus bears considerable emphasis that the instant case does not present the serious questions this Court has confronted in *United States v. Rosner*, 516 F.2d 269, 278-81 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976), and *United States v. Seijo*, 514 F.2d 1357 (2d Cir. 1975), cert. denied 429 U.S. 1043 (1977) where a critical Government witness lied, or where the prosecutor stood mute while the witness lied. *United States v. Agurs*, *supra*, 427 U.S. at 103, n.8.

** In the District Court Ostrer argued at considerable length that Hellerman had committed perjury at Ostrer's trial. Judge Brieant held that the evidence failed to show that Hellerman committed perjury at the trial, and *a fortiori* the Government did not knowingly rely on perjured testimony. (A. 333-41). While part of Ostrer's brief continues to characterize Hellerman's

[Footnote continued on following page]

ious.** Rather he points to the following testimony of Hellerman which Ostrer claims was misleading, and concludes that this is sufficient to invoke the first *Brady* category referred to in *Agurs*:

"Q. Now, in accordance with that agreement or in any other one has the government provided that it will never prosecute you on all of the cases as to which you gave testimony yesterday?

A. No.

Q. Has the government made any representations or promises to you?

A. Only what is contained in the agreement, sir." (A. 969A).

Ostrer contends that this testimony was misleading since Hellerman did not refer either to the \$80,000 Natco transaction, or the Swiss trip. This argument not only views Hellerman's testimony out of the proper context, but seeks to apply a tortured interpretation to the questions asked.

Judge Brieant correctly found that when Hellerman informed the jury that the written agreement contained the Government's promises and representations to him, he was not committing perjury. (A. 343). In the context of this examination of Hellerman Judge Brieant's findings surely were correct. Hellerman was asked only

testimony as misleading. (Br. at 21-25). Ostrer apparently does not contest the District Court's view that Hellerman did not commit perjury at the trial. In any event, no evidence exists to demonstrate that the Government knowingly used perjured testimony, a requirement that is a cornerstone to any due process claim. See *United States v. Silverman*; Dkt. No. 76-2073, slip op. 3937 (2d Cir. May 31, 1977). Indeed, perjury by a Government witness without Government knowledge is not cognizable under 28 U.S.C. § 2255. See *Brach v. United States*, 542 F.2d 4, 8 (2d Cir. 1976); *United States v. Franzese*, 525 F.2d 27, 31 n.7 (2d Cir. 1975) cert. denied, 424 U.S. 921 (1976). See also *Davis v. United States*, 417 U.S. 333, 345-46 (1974).

about his agreement with the Government with respect to prosecution. The written agreement to which Hellerman referred listed various responsibilities Hellerman would have to undertake: plead guilty to three two year felony counts, testify truthfully before grand juries and trial juries, and disclose information to the Government. In return the Government agreed not to prosecute him in numerous other cases, to relocate him and his family, and to insure his physical safety while in jail. (AX. 272-75). This agreement was negotiated between the Government and Hellerman's two highly respected and competent attorneys—Messrs. Broderick and Edwards. Thus, even if it is assumed that when Hellerman testified in January 1973, he understood the Natco transaction to have been a benefit conferred upon him by the Government the specific questions asked of him were not directed at such collateral benefits; but only his prosecution agreement with the Government.* Moreover, when Hellerman was asked at the Ostrer trial if there were other representations or promises, it is utterly inconceivable that Hellerman thought of the release of the \$80,000 of Natco funds in early January 1971, thought that this was a promise or representation by the Government, and then deliberately misled the jury by not raising on his own the \$80,000.**

* Indeed since the uncontradicted testimony of both Hellerman and Morvillo is that Morvillo told Hellerman that the \$80,000 would not be released to Hellerman, (A. 1640), and Hellerman would be prosecuted if he embezzled or stole that money, it was natural that Hellerman would conclude that despite the Government's efforts and not because of those efforts he was able to obtain the \$80,000.

** Indeed, the questions asked of Hellerman specifically used the terms "promises" or "representations." Judge Brieant found that the Natco transaction and the Swiss trip did not amount to either a "promise" or "representation," but amounted to indirect "benefits" conferred by the Government. Since counsel did not ask whether the Government had conferred any benefits on Hellerman, even if the facts are accepted as Ostrer contends, the claim of misleading testimony simply is startling.

Finally the cases cited by Ostrer in the section of his brief on the Government's knowing use of misleading testimony are substantially different than petitioner's case. Construing the facts in a light most favorable to Ostrer, he claims that one misleading answer by Hellerman without more demonstrates that the fact finding process at his trial was tainted, and the Government knew of that taint. The corruption of the truth finding process and the Government's complicity in that corruption is apparent in each of the Supreme Court cases discussed by Ostrer.* For example in *Miller v. Pate*, 386 U.S. 1 (1967) the Government elicited testimony that the defendant's underwear contained blood of the victim's blood type. In fact the prosecution had evidence that the red coloring on the shorts was paint and not blood; a fact suppressed by the prosecution. In *Alcorta v. Texas*, 355 U.S. 28 (1957), the defendant admitted that he had killed his wife, but claimed it was without malice because he saw her kissing another man. At the trial that man denied having an affair with the defendant's wife, and the prosecution knew that testimony was false. Finally, in *Napue v. Illinois*, 360 U.S. 264 (1959), an accomplice in a murder trial denied in response to a prosecutor's question that he had received any promise of special consideration in return for his testimony. The prosecutor knew at the time that this testimony was false.**

* The opinion of *United States v. Agurs*, *supra*, 427 U.S. at 103-107, makes it clear that requiring a new trial when the facts demonstrate the Government's knowing use of perjured testimony is mandated not because of the prophylactic effect of punishing the Government for the misconduct, but mainly because the misconduct resulted in the subversion of the truth finding process.

** Ostrer also cites two other Supreme Court cases, *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Pyle v. Kansas*, 317 U.S. 213 (1942). The facts of those cases are not clear from the opinions; but they do stand for the indisputable proposition that the state cannot knowingly use perjured testimony.

Under the circumstances of this case, it is simply unreasonable and grossly unfair to characterize the Government's conduct in the Ostrer prosecution as even remotely approaching that of the prosecution in *Miller*, *Alcorta*, *Napue*, or any case in which the prosecution knowingly used perjured testimony. Consequently, even under Judge Brieant's view of the Natco matter, Ostrer's claims do not fall within the first category of *Brady* violations.

B. Neither Ostrer Nor Dioguardi Made A Specific *Brady* Request Within the Meaning of *United States v. Agurs*.

As an alternative matter, Ostrer contends that his co-defendant Dioguardi made the type of specific *Brady* request contemplated in *United States v. Agurs*, *supra*, 427 U.S. at 103-07, so that Ostrer is entitled to a new trial upon a showing that the omitted evidence might have affected the outcome of the trial. The request made by Dioguardi falls woefully short of a specific *Brady* request for particular material, and Ostrer's pretrial motions cannot be construed fairly as even a general *Brady* request. Consequently Judge Brieant properly applied the *United States v. Agurs* standard governing the granting of a new trial when the suppressed material does not involve either the Government's knowing use of perjured testimony or the Government suppressed material despite a demand for that particular evidence.*

* To the extent that language in the District Court opinion suggests that Judge Brieant believed Dioguardi had made a specific *Brady* request, we submit that such a determination is incorrect. Moreover, the issue of whether a particular pretrial motion constitutes a specific or general *Brady* request is a legal as opposed to a factual matter in which this Court need not give any special deference to the conclusion of the District Court. Finally, the sole evidence of any *Brady* request which inured to Ostrer's benefit is set forth in documents included in the appendix,

[Footnote continued on following page]

On December 11, 1972, several weeks prior to the Ostrer and Dioguardi trial, Dioguardi's counsel filed, and served a copy on Ostrer's counsel, a motion seeking the following:

"4) any other material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and 5) any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government." (A. 75).

While Ostrer filed a lengthy motion for discovery, he made no request for *Brady* material. (A. 60-72). Indeed Ostrer's brief is clear that he does not argue that he made any *Brady* request; rather he relies solely on Dioguardi's request.

Ostrer mistakenly assumes that he can benefit from Dioguardi's *Brady* request. The obvious purpose of the specific *Brady* request is to focus the prosecutor on particular evidence a defendant believes would be useful to his defense; the defendant is in the best position to know preliminarily the nature of the evidence that will advance his case. Each defendant may perceive that different pieces of information which may be in the Government file will benefit his case. This is especially true in the instant case involving numerous defendants playing different roles in a stock conspiracy.*

(A. 75) and did not include any testimony. Accordingly, even if this is viewed as a factual matter, the District Court was in no better position than this Court to evaluate the significance of Dioguardi's request.

* In fact Ostrer implicitly recognizes that the type of information he might have wanted to focus upon was different from Dioguardi. In a footnote in his brief, (Br. 19) Ostrer contends that Dioguardi had to attack the credibility of four witnesses while he only had to attack Hellerman's credibility.

In addition Ostrer's effort to find support in the trial record for the claim that he should now benefit from Dioguardi's pretrial *Brady* request is unavailing. In the entire trial record Ostrer can find only one reference to an objection by one defendant inuring to the benefit of another.* Several days after the trial commenced and during Hellerman's redirect examination Ostrer's attorney suggested that any objection made by the co-defendant should inure to Ostrer's benefit. The District Court stated that if Ostrer preferred that procedure the Court would allow it. (A. 969). There is nothing in the record to suggest that Ostrer ever asked that motions made by Dioguardi should inure to his benefit.

In any event, Dioguardi's pre-trial motions cannot be construed as a specific *Brady* request. To construe Dioguardi's request as a specific *Brady* request within the meaning of *United States v. Agurs* would eliminate any meaningful content from the phrase, and would be inconsistent with the language and policy underlying the *Agurs*' opinion. In *United States v. Agurs* the Supreme Court delineated a second category of cases involving Government suppression of exculpatory evidence—cases "characterized by a pretrial request for specific evidence." *United States v. Agurs, supra*, 427 U.S. at 104. The Court explained what was meant by a request for specific evidence with reference to the *Brady* case itself, where Brady had made a particularized request for the exculpatory evidence in question—an accomplice's confession which acknowledged that the accomplice and not Brady, actually had strangled the decedent.** The

* Moreover, that single objection hardly amounts to a retroactive adoption of Dioguardi's pre-trial *Brady* requests.

** The accomplice's admission that he had strangled the victim was obviously critical to Brady on the issue of punishment. Brady was convicted of murder and sentenced to death. At trial Brady did not deny his involvement in the killing, but claimed that his accomplice and not he had actually strangled the victim.

Court carefully explained the significance of the specific request made by Brady's counsel for all of the accomplice's extrajudicial statements:

"In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for 'all *Brady* material' or 'anything exculpatory.' Such a request really gives the prosecutor no better notice than if no request is made." *United States v. Agurs, supra*, 427 U.S. at 106-07.

The Court thus held that whether there is a general *Brady* request, or none at all, the suppression of evidence, whether deliberate or otherwise, entitles the defendant to a new trial only if the omitted evidence creates a reasonable doubt.*

Judged by this standard Dioguardi's motion did not constitute a specific request because nothing in the mo-

* In *Agurs* defendant's failure to have asked for the victim's arrest record meant that the materiality of its omission in a case where the defense was self-defense, had to be determined by the rule in cases falling within the third category.

tion would remotely direct a reasonable person to the Natco matter or the failure to oppose Hellerman's trip to Europe. The specific request serves the important function of directing the Government's attention to a particular item that defendant believes is exculpatory.* All that Dioguardi's motion accomplished was to alert the Government to the obvious—the defendant wanted information useful in cross-examining Hellerman.

Courts which have ruled on motions for new trials based on suppression of exculpatory evidence since the decision in *United States v. Agurs* have made the sharp distinction between a general request for *Brady* material and a specific request for particular evidence. For example in *United States v. Lasky*, 548 F.2d 835 (9th Cir. 1977) a Government witness named Stutler admitted to making a trip to import drugs. Apparently at the time of trial the Government knew that he had made other trips not asked about by defense counsel. As part of the discovery requests Lasky had asked for reports, and interviews of 14 potential witnesses including

* In *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968), this court denied habeas corpus relief for a petitioner who contended the Government violated its *Brady* obligations in failing to turn over to the defense unrequested FBI reports on financial records of a Government witness. Judge Friendly spoke about the significance of a specific request for the particular information that the defendant contends was suppressed:

"The defense had made no request for investigative reports of Erdman's [the witness'] finances. We cannot agree with petitioner that where there has not been deliberate suppression in either of the senses we have outlined, the absence of a request is irrelevant. It serves the valuable office of flagging the importance of the evidence for the defense and then imposes on the prosecutor a duty to make a careful check of his files. This consideration is of particular weight in a case, such as here presented, of a long trial with many witnesses and much documentary evidence."

United States v. Keogh, *supra*, 391 F.2d at 147.

Stutler as well as all "*Brady* material" and "*Giglio* material." The court affirmed the conviction holding that this was not a specific request and placed the "Government in no better position than if no request had been made." *United States v. Lasky*, *supra*, 548 F.2d at 839. See also, *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976); *United States v. Jackson*, 538 F.2d 95 (5th Cir. 1976); *Jones v. Jago*, 428 F.2d 405 (N.D. Ohio, 1977).

As with the request in *Lasky*, the motion made by Dioguardi was no more helpful to the Government in flagging areas of concern than if no *Brady* request at all had been made. The substance of that request asked for all material useful in cross-examining Hellerman. Such a general request places the Government in no better position in reviewing its files for potential *Brady* material than if no request had been made. The request in no way places the Government on notice that we may have a particular piece of information relevant to Hellerman's credibility, let alone to what is at most an indirect financial benefit it is claimed was conferred on Hellerman by the Natco transaction. Indeed any contrary conclusion would eliminate the very distinction made in *Agurs* between a specific and no *Brady* request.*

Finally, even if this Court concludes that Dioguardi's motion was a request for specific *Brady* material and that Ostrer could receive the benefits of his co-defendant's request, then the appropriate question would be whether the omitted evidence was material *i.e.* whether the evidence might have affected the outcome of the trial.

* The argument that a defendant cannot be expected to know what is in the Government's files certainly begs the question. *Agurs* recognizes that the Government cannot be expected to know what will benefit a particular defendant; that is the purpose of the specific request.

In view of the actual examination of Hellerman at Ostrer's trial, the additional matters were simply not material. We detail that cross-examination in the next part of our brief, see *infra* at 25-28. The cross-examination revealed that Hellerman was a thoroughly corrupt man who had committed numerous crimes and had secured substantial benefits from the Government. The Natco matter and the failure to oppose the trip to Europe were trivial compared to the substantial impeachment material brought out at the trial.

C. Under The Applicable Standard in *United States v. Agurs* Ostrer Was Not Entitled To A New Trial.

We have demonstrated that Ostrer failed to show that the alleged suppression of exculpatory evidence fell within category one or two of *United States v. Agurs*.^{*} Thus, assuming that Judge Brieant properly found that the circumstances surrounding the release of the \$80,000 of Natco funds and the failure to oppose Hellerman's trip to Europe were *Brady* material which the Government failed to disclose, these omissions clearly fall within the third category enunciated in *United States v. Agurs*. Accordingly, Ostrer was entitled to a new trial only "if the omitted evidence creates a reasonable doubt that did not otherwise exist . . ." *United States v. Agurs, supra*, 427 U.S. at 112. Judge Brieant applied this test and concluded that "in Ostrer's case no reasonable person could say that the suppressed evidence *probably would*

^{*} In evaluating the omitted evidence's possible impact on the jury's verdict, this Court should not overlook the fact that none of the evidence directly or even indirectly exculpates Ostrer. See *United States v. Stofsky, supra*, 527 F.2d at 247; *United States v. Rosner, supra*, 516 F.2d at 269.

have altered the outcome of the trial." (A. 347). That conclusion surely was correct.*

In accordance with the Supreme Court's admonition in *United States v. Agurs*, *supra*, 427 U.S. at 112, that "the omission must be evaluated in the context of the entire record," the Government urged the District Court to review the actual cross-examination of Hellerman at Ostrer's trial. We urge this Court to do likewise. The conclusion that the additional impeachment material would probably not have altered the jury's verdict must inevitably be drawn.

A review of the trial record reveals a lengthy and exhaustive cross-examination of Hellerman, in which Hellerman is portrayed as a thoroughly corrupt and venal criminal who received substantial benefits because of his cooperation with the Government.**

During the trial the jury heard Hellerman repeatedly acknowledge his participation in numerous criminal activities. Hellerman testified that during the preceding

* This Court has made it clear that *United States v. Agurs* established "a more exacting standard for the granting of a new trial," in that the defendant had to demonstrate that "in the context of the entire record, the omitted evidence must raise a reasonable doubt . . ." *United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976). See also *Brach v United States*, 542 F.2d 4, 6 (2d Cir. 1976); *United States v. Corr.*, 434 F. Supp. 408, 414 (S.D.N.Y. 1977).

** Indeed the significance of this additional impeachment evidence is so apparent that even under the pre-*Agurs* test in this Circuit, Ostrer could not have shown that "there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976) *cert. denied*, 430 U.S. 907 (1977); *United States v. Miranda*, 526 F.2d 1319, 1325, 1329 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976); *United States v. Morell*, 524 F.2d 550, 553 (2d Cir. 1975); *United States v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975), *cert. denied*, 425 U.S. 939 (1976).

five years he had been involved in approximately eight to twelve criminal acts for which he was not prosecuted, and three cases in which he pleaded guilty. (A. 481-82, 695). Hellerman acknowledged his role in frauds involving the securities of Belmont Franchising Corporation, Globus, Automated Information, Minute Approval Credit, and At Your Service Leasing. (A. 784-85, 821-22). He admitted that he was involved in having someone pay bribes to New York City policemen, and now expected the United States Attorney's office to help convince the local authorities not to prosecute him. (A. 911-912). Hellerman acknowledged that he purchased stocks, dresses, and jewelry, knowing the items to have been stolen, (A. 913), and that he paid money to others for the purpose of bribing state court judges, a liquor authority investigator, and a union official. (A. 917). In addition, Hellerman testified that he had been involved in criminal activity in connection with Natco, (A. 846), that he had been barred by the Securities and Exchange Commission from activities in the securities industry since 1961, (A. 699), that he told a Jack Kelsey to file false papers with the SEC hiding his interest in a brokerage firm, (A. 705), and that he participated in a scheme to submit a fraudulent check to a Bahamian bank. (A. 712). He also acknowledged disobeying court orders. (A. 836).

Most significantly, the jury heard Hellerman testify that after he had begun to cooperate with the Government and had agreed not to engage in any additional criminal activity, he broke that promise and continued his illicit conduct. (A. 927-28, 1046-47, 1056). Thus, Ostrer's counsel was able to contend that despite Hellerman's failure to live up to the initial agreement with the Government, the Government entered into a subsequent agreement in which Hellerman entered a guilty plea to three counts of two indictments and an information providing a maximum exposure of two years in jail on each count. According to that agreement, Hellerman was not

to be prosecuted for all of his other crimes, a list of considerable magnitude.

The summations both for defendants Dioguardi and Ostrer were replete with references to the corrupt and criminal activity of Hellerman and, the "extraordinary" agreement he entered into with the Government in which he was immunized from prosecution for most of his crimes. Trial counsel emphasized that the Government "bought" the testimony of a man who once before had promised the United States Attorney's office that he would not commit any more crimes, and then went out and continued with his corrupt and sordid activities. (A. 1095-98, 1105-07, 1128, 1139, 1157, 1167-68).

In view of the extensive cross-examination of Hellerman, the litany of crimes that testimony revealed, and the agreement with the Government, it is fanciful in the extreme to suggest that the combination of factors the defendant recites were suppressed by the Government could possibly have created any doubt in the juror's mind. Chief Judge Edelstein recognized during the trial that counsel had "plenty of ammunition, plenty of information, plenty of indictments" to work with in cross-examining Hellerman (A. 716); indeed Dioguardi's trial counsel acknowledged "that the Government has furnished me with a good deal of information" concerning Hellerman. (A. 716). Thus, it borders on the frivolous to suggest that the additional material, even if true and even if it had been suppressed, such as the Natco affair and the failure to oppose the trip to Europe, could have created a reasonable doubt where none had existed as to Ostrer's guilt. Indeed, it is difficult to imagine that any of this new information would have had any impact on the jury at all.

In a misleading attempt to convince this Court that the omitted items would have altered the jury's verdict,

Ostrer in his brief (Br. 13-25) provides an untrue picture of what occurred at trial. He argues that the defendants were allowed only a narrow scope of cross-examination and that the Government improperly vouched for Hellerman. Since Hellerman's cross-examination covered over two hundred pages of the transcript and revealed numerous crimes and misdeeds, the claim that the cross-examination was limited is astounding. Indeed, neither Ostrer nor Dioguardi claimed on direct appeal that the scope of cross-examination was improperly restricted or that the Government had improperly vouched for Hellerman. In sum, to fortify his specious claim, Ostrer simply distorts the record.*

This Court's decision in *United States v. Rosner*, *supra*, 516 F.2d at 271-72, is particularly instructive in evaluating Ostrer's claims. In *Rosner*, the Government had failed to furnish material showing that the Government's main witness—a corrupt police officer—was familiar with policemen keeping narcotics seized from defendants, and that he had conducted a warrantless search for drugs during which he had come upon and kept \$200. The District Court denied defendant's new trial motion and this Court affirmed under the "significant chance" standard. This Court found that the additional crimes revealed by the undisclosed material

* For example at pages 23-24 of his brief, Ostrer claims that the District Court refused to permit inquiry concerning the details of Hellerman's prior criminal activities. The trial transcript is clear that neither the Government nor the District Court had any objection to questions relating to Hellerman's role in prior criminal acts, (A. 714-19), and Dioguardi's attorney agreed that the inquiry should be limited to what Hellerman did and not to convert the Dioguardi-Ostrer trial into a trial on other crimes. (A. 717-18). Further, at page 20 of his brief Ostrer states that the trial court sustained the Government's objection to a portion of Ostrer's summation. The brief fails to state that the objection was sustained because the written agreement had not been received as evidence; the objection was not to the line of argument which continued unimpeded. (A. 1129).

"no matter how skillfully used by defense counsel, would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped." *United States v. Rosner, supra*, 516 F.2d at 278.*

Similarly, just as "Rosner was not confronted by a witness of assumed moral rectitude . . ." 516 F.2d at 275, so Ostrer was not confronted by a Government witness who was portrayed by either the Government or the witness himself as an honest, law-abiding individual. Assistant United States Attorney McGuire referred to Hellerman in his summation as someone "you can find is one of the rottenest creatures you have ever run across." (A. 1171). See also A. 1174.

In the final analysis, this case simply does not present a situation where the information not disclosed showed that a witness committed various crimes, while the Government at trial portrayed the witness as an individual with an unblemished past. Nor are we dealing here with a witness to whom the jury believes the Government made

* This Court's decision in *United States v. Alfonso-Perez*, 535 F.2d 1362, 1367 (2d Cir. 1976) is also useful in evaluating Ostrer's argument on the significance of the additional impeachment material. In *Alfonso-Perez* the Government failed to inform the defendant that a Government witness had been involved in a fight with another prisoner. This Court held that in light of what was revealed at the trial about the witness's exposure to trial or punishment for a number of crimes, "the idea that the jury would be impressed with the argument that he committed perjury because he feared punishment for fighting with a fellow prisoner is simply unbelievable." Moreover, as to another witness, this Court found nothing incorrect in refusing to grant a continuance or other relief because of the unavailability of certain records since the witness' "background and involvement with the Government were made perfectly clear to the jury, and any further information would merely have been cumulative." This language accurately describes the situation in the instant appeal.

no promises when in fact the promises were substantial.* In the circumstances of this case, where the cross-examination was penetrating and complete, and defense counsel had considerably more than ample impeachment material, it is crystal clear that the suppressed evidence would not have had any likely effect on the jury, let alone created a reasonable doubt where none previously existed. Ostrer's motion, therefore, properly was denied by the District Court.

POINT II

The Government Did Not Intentionally Suppress Brady Material.

On this appeal, Ostrer pursues his claims that the Government violated its *Brady* obligations not only with respect to the \$80,000 in Natco funds and the European trip, but also with respect to the alleged non-disclosure of the circumstances surrounding Hellerman's retention of Mr. Broderick. As already discussed *supra*, the District Court found, respectively, that the first two matters

* Even if Ostrer had known about Hellerman's use of the \$80,000 to pay back loan sharks, Ostrer would have had to have made a tactical decision before probing Hellerman for the details. As Hellerman explains in the *Wall Street Swindler*, one of the loan sharks who aided Hellerman when other loan sharks were pressing for their money was Hickey DiLorenzo. (See *Wall Street Swindler* at 240-45). This is the same DiLorenzo from whom Ostrer borrowed \$60,000 at a weekly interest rate of 1½% in order to purchase 14,000 shares of Belmont stock. Undoubtedly, the jury may have looked suspiciously at Ostrer using the same loan shark who helped Hellerman, and the jury may have concluded that Ostrer had a closer relationship to organized crime than would otherwise have been the case. Thus, the details of the \$80,000 may well not have been as beneficial to Ostrer's cause as his brief suggests. See *United States v. Stofsky, supra*, 527 F.2d at 247.

amounted to *Brady* violations, that the third did not, and that none of these violations required a new trial. While, as already extensively argued, we naturally agree with the District Court's ultimate legal conclusion, we respectfully submit that Judge Brieant's characterization of the Natco and European trip matters as *Brady* information, is incorrect. Since defendant persists in these claims anyway, and, in order to dispel the intimation that the Government deliberately suppressed* material it believed was useful to the defendant, we now address this point separately in our brief.

The Supreme Court in *United States v. Agurs, supra*, 427 U.S. at 108, stated that the prosecutor's duty of disclosure is not violated "unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." The Government's constitutional obligation is to disclose *significant* information—evidence which exculpates the defendant or substantially effects a witness's credibility. The obligation is not to disclose every benefit conferred on a cooperating witness no matter how minor or incidental. Viewed against this legal standard the facts surrounding Hellerman's use of \$80,000 of Natco funds, the failure to oppose the trip to Europe, and the telephone call to Hellerman's attorney did not constitute *Brady* material.

* Of course, under *Agurs*, whether omitted information was intentionally or negligently suppressed is irrelevant in deciding whether the defendant is entitled to a new trial. The issue is the potential impact on the jury of that evidence. Thus, in *Agurs*, the Supreme Court stated:

"(n)or do we believe the constitutional obligation is measured by the moral culpability, or the willfulness of the prosecutor . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110.

No case has ever characterized as *Brady* material the type of incidental benefits inadvertently conferred on a cooperating defendant—the type of benefits Ostrer claims the Government suppressed. Indeed, the suppressed matters Ostrer refers to were not Government promises to confer benefits in the future. Rather they all involved matters occurring well before Hellerman testified at Ostrer's trial.

We submit that according to the facts as found by Judge Briant, the inevitable conclusion is that the Government simply did not believe it had intentionally conferred a benefit upon Hellerman. If the Government in good faith did not believe a benefit was conferred, it follows that the Government cannot be accused of intentional suppression of that benefit.

A. The Natco Fraud and Hellerman's Use of \$80,000.

In the Natco matter, Government representatives had concluded that the Government had no right to maintain control over the \$80,000, (A. 1588-89), and could be subject to criticism or litigation if the money was improperly retained. Consequently, a decision was made to return the money to the corporation. To protect the money from misuse by Hellerman the Government decided not to give the money to him (A. 1588-89, 1604); rather the money was to be delivered to an attorney representing the corporation who understood that the money was to be deposited into a corporate account. (A. 1604). In accordance with that plan the money was given to Edward Kurland, who claimed to represent the corporation. Kurland was told by the Government to make certain that the funds were placed in a corporate account. (A. 1653). Prior to receiving the corporate funds, Mr. Kurland showed Assistant United States Attorney Morvillo a letter in which Kurland stated that he represented the

corporation, that he was demanding the funds on behalf of the corporation, and that "upon receipt of these funds, I shall be responsible for their disposition." (A. 14). Finally, Mr. Morvillo informed Hellerman that under no circumstances would the money be given to Hellerman so he could pay back loan sharks (A. 1640), and both Morvillo and Hellerman recalled the former's admonition that Hellerman would be prosecuted if he misused the \$80,000. (A. 1366-67, 1374, 1381-82, 1490-91, 1640-41).

Under these circumstances it is difficult to see what else the Government could have done regarding the \$80,000. The Government returned money it believed it had no lawful right to maintain; the check was transferred to an attorney representing the corporation who pledged to deposit the money to a corporate account; and from the Government's perspective, no benefit whatsoever had been extended to a cooperating witness. Indeed, every action taken by the Government specifically was designed to achieve the contrary result: to prevent Hellerman from getting the \$80,000.*

Moreover, even accepting the District Court's finding that there was such a benefit, the conclusion that the Government deliberately suppressed this information is

* The fact is that Hellerman used the \$80,000 to pay the loan sharks. With the benefit of substantial hindsight, the Government's decision to give the funds to Kun and arguably can be viewed as a mistake. However, it is grossly unfair to castigate Mr. Morvillo with the innuendo that permeates the court papers filed by Ostrer, especially before the District Court. Mr. Morvillo was confronted with an extraordinarily difficult problem—the Government had custody and control over corporate money which the Government doubted it had any right to maintain. The Government was concerned that maintaining these funds exposed the Government to substantial litigation. Thus, Mr. Morvillo in good faith decided to release the funds to an attorney claiming to represent the corporation.

clearly erroneous. Thus, we respectfully submit that Judge Brieant's conclusion is misguided that the Government conferred any benefit at all on Hellerman in respect to the \$80,000 in Natco funds. The Government cannot be expected—especially in the absence of a particularized request—to disclose a benefit to a witness when the Government did not believe it had extended such a benefit. Further, the Government cannot be expected to psychoanalyze a witness and speculate as to whether the witness believes a benefit has been conferred upon him. This is especially the case when the Government explicitly told the witness that it was *not* going to provide him with the money he needed. The Government simply is not responsible for Hellerman's misuse of the money.

Viewed from the perspective of January 1973, the time of the Ostrer trial, these events which had occurred two years earlier did not assume the significance Ostrer argues in his brief. The information surrounding the release of the \$80,000 was not *Brady* material the compelling importance of which to the defense could not be innocently overlooked. First, none of the evidence surrounding the Natco matter, or any of the other alleged *Brady* violations—the trip to Europe or the telephone call to Hellerman's attorney—had anything at all to do with Ostrer's innocence. Thus, "we are not dealing here with government nondisclosure of direct, exculpatory evidence." *United States v. Rosner, supra*, 516 F.2d at 269. Moreover, this evidence did not concern a substantial promise to a cooperating defendant. We are not concerned with the suppression of impeachment evidence of obvious critical significance as typified by *Giglio v. United States*, 405 U.S. 150 (1972), where the Government had not informed counsel of one prosecutor's promise of immunity to a cooperating accomplice,

and the accomplice denied under oath the existence of any such representation.*

Second, the evidence that any Assistant United States Attorney knew about Hellerman's disposition of the \$80,000 at the time of Ostrer's trial is at best scant. Morvillo could not recall if he knew at the time of the trial that Hellerman had used the \$80,000 to pay back the loan sharks (A. 1584, 1608-09), and Hellerman did not recall informing Morvillo. (A. 1390). Judge Brieant inferred such knowledge from one exhibit, "DX G", a memorandum from an Assistant United States Attorney to Mr. Morvillo, stating that Steven Schusteck had withdrawn the \$80,000. Hellerman's name is not mentioned in the memorandum. (AX 16).

Finally, Judge Brieant relied on four specific items in reaching his conclusion that the Government intentionally suppressed the fact that, through Government complicity, Hellerman obtained \$80,000 of Natco funds which he used to pay debts to loan sharks: 1) the failure to include the Natco indictment in the memorandum of agreement between Hellerman and the Government; 2) the absence of any mention of the Natco funds in the memorandum prepared by Assistant United States Attorney Wing and made available to the defense; 3) the Govern-

* This Court has recognized that certain limits do exist in the *Giglio* rationale that the prosecutor's office is a single entity for *Brady* purposes, and thus all information attributable to one prosecutor is attributable to the one trying the case. See *United States v. Rosner*, *supra*, 516 F.2d at 278 n.4; *United States v. Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974) *cert. denied*, 420 U.S. 962 (1975). The Assistant United States Attorney who tried Ostrer submitted an affidavit on this motion in which he stated that at that time of the Ostrer trial he did not have any information about the Natco matter or the release of \$80,000 to Hellerman. (A. 282-84). That affidavit was not contradicted, and Judge Brieant fully accepted its veracity. (A. 321).

ment's failure to provide Ostrer's counsel with a copy of the Natco indictment; and 4) the Government's disclosure in a memorandum submitted to Judge Lasker of Hellerman's cooperation in the Natco investigation. (A. 322). We shall demonstrate that none of these items support the conclusion of intentional suppression.

Indeed, the failure to mention Natco in the agreement between Hellerman and the Government irresistibly supports the opposite conclusion—that the failure to disclose the Natco matter was entirely innocent. Hellerman's attorneys—Messrs. Broderick and Edwards—intended to list explicitly in the memorandum of agreement *all* the frauds for which Hellerman was being granted immunity. Hellerman's attorneys neglected to refer explicitly to the Natco matter.* Judge Briant concluded that the

* Thomas D. Edwards, one of Hellerman's attorneys testified as follows in response to questions about the failure to mention the Natco fraud at the evidentiary hearing (A. 1703-05):

"Q. In fact you signed, did you not, the written agreement between Hellerman and the Government?

A. Yes.

Q. Mr. Edwards, first of all, were you aware of any promises made to Mr. Hellerman or to his attorneys that were not specifically set out in that agreement?

A. No. The attempt that was made by Morvillo and myself was to put everything in there that was part of the bargaining between Hellerman and the Government.

Q. Did the issue prior to the execution of this agreement, did the issue of Hellerman's involvement in the Natco Merchandise Plus bankruptcy fraud come up in discussion between Hellerman's counsel and Morvillo?

A. Am I correct that there is no reference at all to that in the agreement?

Q. Yes, sir.

A. I must tell you frankly, that is a surprise to me. Hellerman's participation in that was very well known, indeed, as I remember it. The trial had occurred around nine months prior to the signing of the agreement.

[Footnote continued on following page]

failure to have included Natco in the memorandum of agreement was evidence of wilful suppression by the Government. That conclusion is simply wrong. The fact that two highly competent criminal attorneys, Messrs. Broderick and Edwards, charged with the responsibility of diligently protecting Hellerman's legal interests, overlooked the Natco matter vividly demonstrates that the failure to refer to Natco in the written agreement had to be inadvertent. The District Court's view that the Government deliberately made no mention of Natco overlooks the fact that the agreement was drafted by *Hellerman's attorneys* and the Government, not the Government alone. Hellerman's attorneys had every interest in including the Natco indictment in the agreement as one more area of immunity.

The innocent explanation for the failure to have included the Natco case in the written agreement between Hellerman and the Government is further shown when one recognizes that the Natco indictment had been filed, and the Natco trial had occurred, over a year-and-one-half before Ostrer's trial. The indictment named Hellerman

THE COURT: That is the trial of the Natco indictment?

THE WITNESS: Yes, your Honor. My memory is it was around March or so and the agreement probably wasn't until September, perhaps, or maybe even October. I don't remember, and it was our intention in listing cases to put in there every case we could think of that Hellerman had participated in and that was known to the Government as of the time of the agreement we were signing and as of now, I have no explanation for why that would not have been in there because Hellerman's participation in that was well known to everyone and it was obvious that he was not going to be a defendant in that case. As is, the trial had already occurred and the only thing I can think of, and I don't mean to be facetious, which is this; there were so many cases in which Hellerman had participated, that although we were trying to be careful, we may have merely forgotten."

as a defendant, and his role in the fraud inevitably came to light during the Natco trial. There is plainly no reason to believe the Government and Hellerman's counsel would have deliberately omitted the Natco fraud from the written agreement when Hellerman's participation in that fraud was well known as a matter of public record. Indeed, during the Ostrer trial, Jay Goldberg, Esq., attorney for Ostrer's co-defendant Dioguardi, questioned Hellerman about whether he had been indicted in connection with the Natco fraud. After Hellerman acknowledged that he had been indicted and had received part of the proceeds of the fraud, he further testified that he did not expect the Government to prosecute him on that indictment. (A. 846-47).

Judge Bricant found additional significance in the failure to refer to the Natco matter in the memorandum prepared by Assistant United States Attorney John Wing and made available to Ostrer at the time of his trial. (A. 322). Reliance on the absence of the Natco matter in that memorandum misconstrues the purpose of the Wing memorandum. As Mr. Wing testified at the evidentiary hearing, the purpose of the memorandum was to list frauds which Hellerman disclosed to Wing and which the Government did not know about. At the time Wing debriefed Hellerman in order to obtain information for other cases, the Natco case already had been the subject of an indictment and trial. The Wing memorandum was simply a *Brady* memorandum prepared by Mr. Wing based on several interviews of Hellerman. (A. 1675-78, 1684-89). Since Hellerman did not discuss the Natco matter with Mr. Wing (A. 1676), it is certainly not surprising that there is no reference to that fraud in the Wing memorandum. (AX. 27).

The other two items relied on by Judge Bricant also provide no basis for a finding of intentional suppression.

The memorandum submitted to Judge Lasker and the Natco indictment, both of which were not given to Ostrer's trial counsel, did not mention the release of the \$80,000 to a Natco attorney, or the subsequent embezzlement of that money by Hellerman. Thus, to have provided Ostrer with the Natco indictment or the memorandum to Judge Lasker would not have aided Ostrer in the slightest. Indeed, Dioguardi's counsel questioned Hellerman about his role in the Natco scandal and his being named in the Natco indictment. (A. 846-47).

B. Hellerman's Trip to Europe and the Reduction in His Legal Fees.

The reasons we have articulated to demonstrate that the Government did not have a constitutional obligation to disclose the facts surrounding Hellerman's use of the \$80,000, also justify the conclusion that the Government's failure to have opposed Hellerman's European trip was not *Brady* material. Failing to oppose a defendant's motion to enlarge his geographic bail limits simply is not a significant benefit effecting the witness's credibility which must be disclosed. Ostrer's argument would lead to the following bizarre conclusion: a Government attorney who fails to oppose any motion made by a defendant must memorialize the non-opposition, just in case that defendant becomes a witness in a future case. We reiterate what seems to have been forgotten in the plethora of rhetoric in Ostrer's brief—the Due Process Clause of the Constitution, which is the basis of *Brady* is only violated when the Government fails to disclose *significant* information; incidental benefits conferred upon a cooperating defendant do not fall within the ambit of the due process clause.

Ostrer further claims that Mr. Morvillo's telephone call to Mr. Broderick informing him that Hellerman was cooperating constitutes *Brady* material. Judge Briant rejected Ostrer's contrived view that this was *Brady*

material. Ostrer seemingly argues that the Government should have read Hellerman's mind and thus have concluded that Hellerman thought the Government was responsible for the reduction in legal fees. Of course the Government never interceded on Hellerman's behalf to secure a reduction of legal fees, and had no obligation to speculate as to what the witness believed.

POINT III

The District Court Properly Refused to Reopen the Juror Competency Issue.

Ostrer, with scant discussion in his lengthy appellate brief, contends that the District Court erroneously refused to conduct an evidentiary hearing into the mental competence of Geneva Rush, a member of the jury which convicted Ostrer. Ostrer did not seriously press this issue before Judge Brieant, but relied solely upon a questionable affidavit from the juror's brother which, in any event did not add any new information to this obviously stale claim. The District Court properly denied this motion.

In order to evaluate properly Ostrer's claim, we must set forth the pertinent background in prior proceedings, completely neglected in defendant's appellate brief.

Shortly after the jury had found Ostrer and Dioguardi guilty, Dioguardi received a letter from one of the jurors, Geneva Rush. Dioguardi submitted the letter, along with a number of letters and one affidavit from seven psychiatrists who had analyzed the letter. Dioguardi and Ostrer moved for a new trial on the ground that the juror suffered from "a mental infirmity making her in-

capable of rendering efficient jury service" within the meaning of 28 U.S.C. § 1865(b)(4). Chief Judge Edelstein denied the motion, without conducting a hearing, and on appeal this Court affirmed that denial. *United States v. Dioguardi*, 361 F. Supp. 954 (S.D.N.Y. 1973), *aff'd*, 492 F.2d 70 (2d Cir. 1974).

Approximately four years after the juror wrote the letter to Dioguardi, and on the eve of Ostrer's anticipated surrender, Ostrer first came forward with an affidavit from the juror's brother, Junius Rush. Based on that affidavit Ostrer moved for further consideration of his new trial motion on the ground of juror incompetence. (A. 21-23) After receiving a copy of Junius Rush's affidavit Ostrer moved for further consideration of his signed an affidavit which in significant respects contradicted the previous affidavit submitted by Ostrer.* Judge Brieant denied Ostrer's motion to reopen the issue of the juror's competence, finding that the new affidavit contained no new evidence which had not been before

* In the initial affidavit Mr. Rush stated that his sister had informed him in 1970 that she was involved with spiritualists, would learn to "see the unknown," and had a friend named Bertha. The affidavit related an alleged incident during the Ostrer trial when Junius Rush heard his sister and Bertha state that "they must be guilty," and his sister referred to the defendants as "the Italian" and "the Jew." His sister also told him as recently as April 5, 1977, that she had made a mistake in voting to convict. The Government interviewed Mr. Rush after receiving this affidavit, and Mr. Rush executed a second affidavit. In that affidavit Mr. Rush stated that his sister had never stated during the trial that the defendants were guilty, and never referred to the defendants as the "Italian Mobster and the rich Jew" or anything similar to that characterization. Rush also swore that at no time since the trial did his sister ever state that she made a mistake by voting guilty. Finally, the second affidavit stated that he recalled a "two minute" conversation between his sister and Bertha during the trial. During that conversation his sister never stated that the defendant was guilty.

this Court in 1974 and that the motion was "cumulative, repetitious and untimely." (A. 253-54).

Ostrer's motion was extremely tardy and exhibited an utter failure to act with due diligence in bringing to the District Court's attention the matters referred to in Mr. Rush's affidavit.* According to the affidavit submitted by Ostrer's own investigator, the defendant knew of Mr. Rush's existence since early 1976, and Ostrer showed no reason why he could not have discovered this alleged new evidence at an even earlier date. (A. 217). Ostrer proffered no reason for the substantial delay in not raising this matter until April 1977—shortly after this Court affirmed the denial of Ostrer's other new trial motion—when he obtained an affidavit from Mr. Rush who has lived and worked in New York City since 1969. Indeed at no time has Ostrer offered any justifiable excuse for the delay. On this basis alone, the District Court would have been justified in denying defendant's present motion.

Moreover, Mr. Rush's affidavit failed to add additional information about the juror's competence which was not already before the District Court and this Court on the earlier refusal to order a hearing into the juror's mental competence. Indeed, in the letter addressed to Dioguardi, Geneva Rush stated that she talked to her friend Bertha, and that she can see things before they happen. She urged Dioguardi to repent and that she knew he was basically a good person who made the mistake of befriending Hellerman. The initial affidavit from Junius Rush adds no new information to his sister's earlier letter.

* This Court has consistently held that a defendant seeking a new trial must show that he acted with due diligence in acquiring the information he claims entitles him to a new trial. *United States v. Stofsky*, *supra*, 527 F.2d at 244-45; *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

Based on the same type of information contained in Mr. Rush's affidavit, this Court affirmed the District Court's earlier denial, without an evidentiary hearing, of Ostrer's motion for a new trial based on Geneva Rush's mental competence. *United States v. Dioguardi, supra*, 492 F.2d at 78-81. This Court's opinion clearly set out the reasons to oppose post verdict inquiry into a juror's state of mind and into juror's conduct. We will not repeat what this Court stated except to reiterate the quoted language from *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied sub nom. Mittleman v. United States*, 368 U.S. 984 (1962):

"There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not to be increased; verdicts ought not be made so uncertain."

See also *McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Miller*, 403 F.2d 77 (2d Cir. 1968).

Even on his present motion, Ostrer was never clear as to the course of action he proposed the District Court to undertake. Presumably, he wanted to examine the juror both "testimonially" and medically. It is difficult to comprehend the validity of any such inquiry of a juror's mind at any time; such an investigation over four years after the relevant time period seems particularly pointless. In fact, since the defendant is barred from allowing the juror to impeach the verdict based on an inquiry into her state of mind, there appears to be no reason to reopen the juror issue. Even if a hearing could substantiate everything contained in the brother's affidavit, the defendant would not be entitled to any relief because he would still

have to probe the juror's mind, and the law forbids that inquiry.* See Rule 606(b), Federal Rules of Evidence.

Finally, Ostrer's purported showing of new evidence fell pitifully short of raising any new factual issue worthy of a hearing.

In deciding whether a hearing was required, the District Court was entitled to consider the affidavit of Junius Rush filed by the Government, in which he repudiates much of his initial affidavit. Rush, in his second affidavit swore that his sister did not tell him during the trial that she believed the defendants were guilty, and did not refer to the religion of the defendant. In view of this contradictory affidavit, we fail to see what possible benefit would have been derived in reopening the juror competency issue. Indeed, once the Government filed Rush's contradictory affidavit, Ostrer made no effort to submit an additional affidavit from Mr. Rush explaining the

* Judge Weinstein in his treatise on the recently enacted Federal Rules of Evidence discusses various attacks on a jury's verdict. He suggests the hypothetical of the juror who states he does not trust convicts after a conviction is used to impeach, or the juror who refers adversely to the length of a defendant's hair or to a witness's religion, and then those statements are offered on a motion for a new trial. Judge Weinstein offers the following explanation:

"Can proof of these statements . . . be separate from proof of the effect these statements had on the minds of the jurors, or are the two so inextricably interwoven that the entire testimony should be rejected under the Rule? The line may be very difficult to draw. Generally, it seems better to draw it in favor of juror privacy; in the heat of juror debate all kinds of statements may be made which have little effect on outcome, though taken out of context they seem damaging and absurd. The amendments to the 1971 draft discussed in paragraph 606(01), *supra*, support this interpretation." See 3 *Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and Magistrates*, p. 606-36 (1976).

second affidavit, which had the effect of negating the earlier submission.

Ostrer also claims that Mr. Rush's affidavit raised the possibility that prejudicial external influences were exerted upon Geneva Rush during the trial. While Ostrer attempts to suggest that the juror's friend Bertha may have exerted external influence on the juror, there simply was insufficient evidence submitted by Ostrer in the District Court to even raise that claim. Ostrer did not submit any affidavit from the juror's friend who would be the source of any prejudicial information, and no explanation for the lack of such an affidavit has been advanced.

Thus, there simply was nothing new before the District Court on this ancient and previously rejected claim by Ostrer. The District Court therefore, properly refused to further extend the proceedings before it with a fishing expedition and evidentiary hearing on this question.

CONCLUSION

The District Court's order should be affirmed.

Respectfully submitted,

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